IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 02.07.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.R.C.No.1032 of 2003

K.Kumaravel .. Petitioner/Appellant/Accused

vs.

1.P.Venkatachalam

2.The Public Prosecutor,
High Court, Chennai-104. .. Respondents/Respondents/
Complainant

Prayer:- This revision petition has been preferred against the judgment dated 21.5.2003 in C.A.No.57 of 2002 passed by the learned Additional District and Sessions Judge, FTC-II, Salem, confirming the judgment made in C.C.No.88 of 2000 on the file of the Judicial Magistrate No.I, Mettur, dated 03.04.2002.

For Petitioner :Mr.D.Selvaraju
For Respondents :Mr.S.Doraisamy for R1

Mr.V.R.Balasubramanian
Additional Public Prosecutor

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JUDGMENT

This revision has been preferred against the judgment in C.A.No.57/2002 on the file of the Additional Sessions Judge (FTC.No.II), Salem, which had arisen out of the findings of the learned trial Judge in C.C.No.88 of 2000 on the file on the Judicial Magistrate No.I, Mettur, Salem.

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2.The short facts in the complaint preferred by the complainant under Section 200 of Cr.P.C., for the offence under Section 138 of the Negotiable Instrument Act against the accused is that the accused had borrowed a sum of Rs.1,90,000/- on 10.10.1999 and in order to discharge the said subsisting loan, the accused had drawn a cheque for Rs.1,60,000/- in favour of the complainant on 6.1.2000 and also had drawn another cheque for Rs.30,000/- on 15.2.2000 in favour of the complainant and when those cheques were presented in the bank, they were returned with an endorsement that there is no sufficient funds in the accounts of the accused to honour the same. The complainant had issued a notice as contemplated under Section 138(b) of the Negotiable Instruments Act on1 5.4.2000, which was received by the accused on 19.4.2000, but he has neither chosen to repay the debt amount nor sent any reply to the notice. Hence, the complaint.

3.The complaint was taken on file by the learned trial judge and on appearance of the accused on summons, copies under Section 207 of Cr.P.C., were furnished to the accused and when the offence was explained to the accused, he pleaded not guilty.

4.P.W.1 is the complainant, who would would depose what he had narrated in the complaint. He has also identified Ex.P.1 and Ex.P.2 as the cheque drawn by the accused for a sum of Rs.1,60,000/- on 6.1.2000 and for a sum of Rs.30,000/- on 15.2.2000 respectively, and that those cheques were presented for collection in the Indian Bank, Kolathur Branch, Wherein the complainant is having his account.

5.According to P.W.2, both Ex.P.1 & Ex.P.2 were forwarded to Punjab National Bank, Erode Branch, for realisation and both the cheques were returned from the Punjab National Bank, Erode Branch, wherein the accused is having his account as there is no sufficient funds in the accounts of the drawer of the cheque. Ex.P.3 & Ex.P.4 are the cheque return memos sent along with Ex.P.1 & Ex.P.2, impugned cheques. Under the original of Ex.P.5 the complainant had sent a notice to the accused which was received by the accused on 19.4.2000 under Ex.P.6- acknowledgment. Ex.P.7 is the statement of accounts for the accused's account in credit on the date of drawal of those cheques.

6.P.W.3 is the Manager of the Indian Bank, Kolathur Branch, who would depose that Ex.P.1 and Ex.P.2 cheques were forwarded to his branch, but they were returned with an endorsement that there is no sufficient funds to honour Ex.P.1 & Ex.P.2 in the account of the drawer of those cheques. Ex.P.8 is the collection register maintained in the Indian Bank, Kolathur Branch.

7.When incriminating circumstances were put to the accused under Section 313 of Cr.P.C., the accused denied his complicity with the crime. After going through the available evidence both oral and documentary, the learned trial Judge has held that an offence under Section 138 of the

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Negotiable Instruments Act has been made out against the accused and consequently convicted and sentenced the accused to undergo 6 months RI and a fine of Rs.2,500/- with default sentence. Aggrieved by the findings of the learned trial Judge, the accused has preferred an appeal in C.A.No.57 of 2002 before the Additional District and Sessions Judge, FTC.No.II, Salem, who after giving due deliberations to the submissions made by both the counsel and also after scanning the evidence let in before the trial Court, has confirmed the findings of the learned trial judge, thereby dismissing the appeal, which necessitated the accused to prefer this revision before this Court.

8.Now the point for determination in this revision is whether the conviction and sentence under Section 138 of the Negotiable Instruments Act against the accused is liable to be set aside for the reasons stated in the memorandum of revision?

9.The Point:-

9(a) As far as the conviction under Section 138 of the Negotiable Instruments Act against the accused is concerned both the Courts below have taken a concurrent view that the offence under Section 138 of the Negotiable Instruments Act has been proved by the complainant against the accused beyond any reasonable doubt. The drawal of Ex.P1 and Ex.P.2 chques by the accused in favour of the complainant has not been denied by the accused. Under such circumstances, the presumption under Section 118 & 139 of the Negotiable Instruments Act will come into play, and the presumption is to be against the accused to the effect that only to discharge a subsisting liability Ex.P.1 & Ex.P.2 cheques were drawn by the accused in favour of the complainant.

9(b)The learned counsel Mr.D.Selvaraju appearing for the revision petitioner/accused would fairly admit that the accused has not issued any reply notice for the notice issued by the complainant which was received by him under Ex.P.6-acknowledgment. But only thing to be gone into in this revision is that both the Courts below have awarded six months RI and also slapped a fine of Rs.2,500/- with default sentence.

9(c) The learned counsel appearing for the revision petitioner relying on Vol-XII 1994(3) Crimes 1014 (Ishvarbhai Fuljibhai Patni Vs. State of Gujarat), would contend that the first appellate Court has failed to look into the evidence let in by the accused in defence, which has been deprecated by the Honourable Apex Court in the above said ratio. The exact observation of the Honourable Apex Court in the above said ratio reads as follows:-

> "For this purpose, the record was called for and after perusal of the original record, we are satisfied about the correctness of the aforesaid conclusion. It is very much warranted by the evidence on record and the learned Sessions Jude, Ahmedabad, after taking into consideration the entrire material placed before him and properly appreciating the arguments advanced on either side has held that the accused-

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appellant is guilty. We therefore, would not interfere in this matter for the reasons stated above and the matter is dismissed."

The above observation has been extracted only from the judgment of the High Court in the appeal."

A reading of the above judgment will go to show that the Gujarat High Court without any discussion has simply narrated the case of the prosecution and after hearing the arguments, has held that the appellant is guilty without discussing the evidence let in by the accused in defence.

9(d)In the case on hand, the accused had examined one Matheswari on his side and also exhibited Ex.D.1, finance registration copy. D.W.1-Matheswari would depose that she had conducted a chit along with Murugesan, Rajeshwari, Kumarevel, Ravi, Rajamani, Moorthi, Sakthivel, Rajathi and Arumugam in the name and style of Sri Maga Ganapathy Finance from 3.6.1993 and that the said chit was conduced for 5 years from 3.6.1993 and since it incurred loss, they have stopped the running of the chit and that in the above said chit the accused was an Assistant Administrative Partner and in the said chit the accused had given unfilled cheques to one Murugesan and that in turn the said Murugesan had handed over those cheques to Rajathi's husband Venkadachallam and that the said Venkatachalam might have handed over the cheques to the present complainant Venkatachalam, who had used those cheques in this case. But a perusal of Ex.P.1 & Ex.P.2 cheques will go to show that they have been drawn by the accused in the name of P.Venkatachalam, the complainant herein. Further it is not in evidence that Venkatachalam, the husband of Rajathi referred to by D.W.1 has not preferred any complaint against the present complainant regarding the forgery of Ex.P.1 & Ex.P.2 by this complainant. Further, admittedly for the notice issued by the complainant under the original of Ex.P.5 which was received by the accused under Ex.P.6, the accused has not sent any reply. Under such circumstances, the accused cannot be heared to say the defence raised through D.W.1. The defence put forward by D.W.1 on behalf of the accused herein was not at all raised by the accused in this case by way of any reply notice. Under such circumstances, the contention of the learned Counsel that the defence raised by the accused through D.W.1 was not given due consideration by the first appellate Court cannot hold any water.

9(e)The learned counsel appearing for the accused relying on 2003 Crl.L.J, 4766 (Hsanba @ Hassinar Vs. State of karnataka), would contend that a Court sitting in review of the judgment of the Courts below must also give due consideration to the evidence let in by the parties before the trial Court. The same principle has been taken in the judgment referred to by the learned counsel for the accused Vol-XII 1994(3) Crimes 1014 (Ishvarbhai Fuljibhai Patni Vs. State of Gujarat). As I have already held that the accused, who had not raised any defence by way of his reply notice, cannot let in any evidence through his witness raising a new defence during the trial. Further in this case, there is absolutely no evidence to show that Ex.P.1 & Ex.P.2, impugned cheques, were handed over by one Venkatachalam, husband of Rajathi, to the present complainant Venkatachalam. Under such circumstances, the ratio referred to by the

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learned counsel appearing for the revision petitioner/accused will not be of any use to him in this revision.

9(f)In view of the ratio laid down by the Honourable Apex Court in 2004(2) SCC 235 (Goa Plast (P) Ltd. Vs. Chico Ursula D'Souza), instead of awarding rigorous imprisonment, twice the amount of the cheque is to be directed to be paid by the accused to the complainant by way of compensation. The exact observation of the Honourable Apex Court in the above said raito in this regard runs as follows:-

> "We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the NI Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act.
>
> The object and the ingredients under the provisions, in particular, Sections 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforesaid provisions. The remedy available in a civil Court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee.
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> After observing thus, the Honourable Apex Court concluded by ordering the compensation as twice the amount of the cheque.

I am of the opinion that the same yardstick can be followed in this revision also. Point is answered accordingly.

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10.In fine, the revision is dismissed confirming the conviction passed by the First appellate Court in C.A.No.57 of 2002 on the file of the Additional District and Sessions Judge, FTC-II, Salem, but the sentence alone is modified as here under. The sentence of the six months RI and a fine Rs.2,500/- passed by the trial Court, which was confirmed by the first appellate Court against the accused, are hereby set aside and two months time is granted to the accused/revision petitioner to pay Rs.3,80,000/- (twice the cheque amount) towards compensation to the complainant, in default to undergo 3 months SI. Fine if already paid shall be refunded to the accused.

ssv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1.The Additional District & Sessions Judge,
FTC-II, Salem.
2.The Principal District & Sessions Judge,
Salem.
3.The Judicial Magistrate No.I,
Mettur, Salem.
4.-do- The Chief Judicial Magistrate,
Salem.
5.The Public Prosecutor, High Court, Madras.

+1 cc to Mr.D.Selvaraju, Advocate Sr.No.39806.

+1 cc to Mr.S.Doraisamy, Advocate Sr.No.39353.

NSM(CO)
dcp/16.7.07

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